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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,

Petitioner,

vs.

THE HOOVEN & ALLISON COMPANY,

Respondent.

On Petition For Writ Of Certiorari To
The Supreme Court Of Ohio

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

The International Association of Assessing Officers hereby respectfully moves for leave to file a brief amicus curiae in the above-captioned case in support of the Petitioner. The consent of the attorneys for the Petitioner has been obtained, and they have advised counsel for the International Association of Assessing Officers in telephone conversations that they will forward their written consent to the Clerk of the Supreme Court. The consent of the attorney for the Respondent was sought, but he

did not return phone calls placed by counsel for the International Association of Assessing Officers.

The International Association of Assessing Officers (IAAO) has approximately 7,800 members. Most of the members are employees of state and local governments. The members reside in all 50 states and other countries. The Association is primarily interested in property tax assessment. The eight objectives of IAAO as stated in the IAAO Constitution, Art. 1, Sec. 2, amended as of November 15, 1982, are as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assessment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearing-house for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; and (8) to promote justice and equality in the distribution of the property tax burden.

Although most of the members of the Association are engaged in assessment administration for property tax purposes at the state and local levels of government, the Association is not a "trade union" for assessors, but rather, is a nonprofit, educational institution interested in promoting proper and equitable property taxation. In that role, the Association has often been invited to present testimony to Congress and to state and local legislative bodies when proposals relating to the property tax have been considered. In a related effort, the Association also submits amicus curiae briefs in court cases that might have a substantial impact on the property tax and/or the assessment profession.

The case before the Court could have such a substantial impact. As noted in the Petition for Writ of Certiorari (p. 16), the decision of the Supreme Court in the instant case could have a significant detrimental effect upon the finances of the State of Ohio if the Court rules for the Respondent. Other states could be affected in a similar manner, since at least 18 of them, according to the Association's records, levy taxes on raw materials like the subject property in the instant case. The state and local governments which employ most of the members of the amicus Association would lose much badly needed revenue if the Court's decision in this case results in the automatic exemption of imported raw materials from ad valorem taxation where the imports remain in their original packages, or if the Court holds that collateral estoppel prevents Ohio from levying such taxes in the case at bar. In either event, litigation expenses associated with assessment appeals resulting from the resuscitation of the "original package" doctrine would also drain state and local treasuries, since assessing officers have believed for years that the original package doctrine was justifiably put to death by this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and have not referred to that doctrine in determining whether imports should be taxed, even where identical goods under identical ownership were held exempt from taxation under the original package doctrine in court cases preceding the *Michelin* decision.

Aside from the financial impact the instant case could have upon state and local government, the amicus Association anticipates gross inequities in ad valorem property tax burdens resulting from a decision for the Respondent in the case at bar. Imported raw materials stored in their original packages could be exempted from taxation, while

imported raw materials removed from their original packages, or not packaged at all, would be subject to taxes, along with domestically produced manufacturers' inventories. Raw materials belonging to property owners who were in operation before the *Michelin* decision, and who successfully appealed assessments on identical materials, obtaining a judicial ruling that the goods were exempt under the original package doctrine, could not be taxable by state and local governments, while all other imported raw materials would be taxable.

Exemptions of the sort proposed by the Respondent for its raw materials also tend to result in increased taxation of non-exempt properties and/or a reduced level of state and local government services to the citizenry. Such developments are of vital interest to all state and local government employees, and particularly those who administer the property tax, as well as others who have dedicated themselves to making the property tax a more viable and equitable method of taxation.

The amicus Association is in a unique position to assess for the Court the probable impact of a decision for the Respondent in this case. The Association is aware of the extent to which property has already been exempted from taxation in the United States and around the world, and of the damage, in terms of assessment inequity and reduced state and local government services, which has been partly caused by current exemptions. Yet the Association is aware that responsible and humane public policy requires that many property tax exemptions continue to exist, and the Association can view the potential costs and benefits of a ruling for the Respondent in this case with a certain objectivity that neither of the parties to the case can be expected to demonstrate.

Because of the Association's interest in the outcome of this case and because the Petitioner cannot fairly be expected to address in a complete fashion the broader implications of the Respondent's contentions, the International Association of Assessing Officers respectfully requests leave to file the attached brief amicus curiae. The arguments set forth in the brief amicus curiae are relevant to disposition of this case.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

INTEREST OF AMICUS CURIAE

The International Association of Assessing Officers (IAAO) has approximately 7,800 members. Most of the members are employees of state and local governments. The members reside in all 50 states and in other countries. The Association is primarily interested in property tax assessment.

The eight objectives of IAAO as stated in the IAAO Constitution, Art. 1, Sec. 2, amended as of November 15, 1982, are as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assessment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearing-house for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; and (8) to promote justice and equity in the distribution of the property tax burden.

The Association is not a "trade union" for assessors, but rather, is a nonprofit educational institution interested in promoting proper and equitable property taxation. Consequently, IAAO is concerned about assessment inequities that will result if the Court adopts the Respondent's theory that imported raw materials in their original packages and held for use in manufacturing within the state cannot be subjected to non-discriminatory ad valorem property taxation, along with other raw materials stored for use in manufacturing. IAAO is concerned about the inequities that will result if the Court affirms the decision of the Supreme Court of Ohio, which misinterprets the doctrine of collateral estoppel and the ruling of the Supreme Court of the United States in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), so as to make one manufacturer perpetually immune from ad valorem property taxation on its imported raw materials while all other businesses' imported goods, including raw materials, are subject to nondiscriminatory ad valorem property taxation

because of a change in the controlling legal principles applicable to imports, announced by the Supreme Court of the United States in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). IAAO is concerned about the mountain of costly litigation that will result if the "original package" doctrine, rightly considered by most state and local government officials as buried by the Supreme Court of the United States in the *Michelin* case, is resurrected through a decision favoring the Respondent in the case at bar. Finally, IAAO is concerned about the loss of badly needed revenue which state and local governments may suffer if the Respondent prevails in this case. IAAO believes that neither the collateral estoppel doctrine, nor the U.S. Constitution prohibits Ohio's levying of non-discriminatory ad valorem personal property taxes on the Respondent's imported raw materials, and that the Court should rule accordingly.

SUMMARY OF ARGUMENT

We submit that the Supreme Court of Ohio erred in concluding that the Petitioner's levying of taxes upon the Respondent's imported raw material inventory was collaterally estopped by a decision of the Supreme Court of the United States in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (*Hooven I*) Under the principles enunciated by the Court in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), application of the collateral estoppel doctrine in the case at bar was precluded by the Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), which so altered the legal atmosphere relative to the

constitutionality of personal property taxation of imports as to eviscerate the Respondent's collateral estoppel claims. The application of the *Sunnen* ruling in this case is not foreclosed simply because the *Michelin* Court did not specifically overrule *Hooven I*, and the application of the *Sunnen* ruling in the case at bar is, in fact, required in order to avoid inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and litigious confusion. Accordingly, the Court should hold that the Petitioner's levying of an ad valorem tax upon the subject imported raw materials belonging to the Respondent is not barred by the doctrine of collateral estoppel.

The amicus IAAO also submits that the Court should decide the constitutional issues raised by the parties in favor of the Petitioner. The *Michelin* Court held that imposition of a non-discriminatory ad valorem personal property tax on imported goods held for sale is not within the constitutional prohibition against laying "any Imposts or Duties on Imports." The same analysis that led the *Michelin* Court to its decision also leads to the conclusion that imported raw materials may be subjected to non-discriminatory taxation of the sort imposed by Ohio in the case at bar, and such a determination is required in order that assessment inequities may be avoided and much needed revenue will not be denied to hard-pressed state and local governments. Therefore, the Court should hold that the Petitioner's levying of an ad valorem personal property tax upon the subject imported raw materials belonging to the Respondent is not prohibited by the Import-Export Clause of the Constitution.

ARGUMENT

1.

THIS COURT SHOULD HOLD THAT THE PETITIONER'S LEVYING OF AN AD VALOREM PERSONAL PROPERTY TAX UPON THE SUBJECT IMPORTED RAW MATERIALS BELONGING TO THE RESPONDENT IS NOT BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

In this proceeding involving the Respondent's application for a review and redetermination of the Petitioner's decision that the value of the Respondent's imported raw material inventory is subject to non-discriminatory ad valorem personal property taxes, the Supreme Court of Ohio found that the Petitioner's levying of taxes upon the subject property was collaterally estopped by a decision of the Supreme Court of the United States in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (hereafter referred to as *Hooven I*). In that case, the Court, relying upon the "original package" doctrine, held that the Respondent could not be taxed based upon the value of imported raw materials stored in their original packages in the Respondent's warehouses. *Hooven I*, 324 U.S. 652, 668.

Where the Supreme Court of Ohio erred was in rejecting the Petitioner's argument that the decision of this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), so altered the "legal atmosphere" relative to the constitutionality of personal property taxation of imports as to eviscerate the Respondent's collateral estoppel claims. A careful reading of the *Michelin* decision and the decision of this Court in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), provides ample evidence that collateral estoppel should not have been applied in the case at bar.

In the *Sunnen* case, the Supreme Court limited application of the collateral estoppel doctrine, holding that the doctrine is inapplicable where decisions of the Supreme Court intervening between the earlier and later litigation have changed the pertinent legal principles upon which the earlier court decision was based. *Commissioner v. Sunnen*, 333 U.S. 591, 599-601. Thus, the decision of the Court in *Sunnen* precludes application of collateral estoppel in the case at bar, since the Court in *Michelin*, intervening between *Hooven I* and the current litigation, abandoned the original package doctrine upon which *Hooven I* was based, at least with respect to its application in cases involving non-discriminatory property taxes (*Michelin Tire Corp. v. Wages*, 423 U.S. 276, 296-97), and specifically overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), the case from which the original package doctrine sprung (*Michelin Tire Corp. v. Wages*, 423 U.S. 276, 301). A better example of a case changing the legal principles upon which an earlier decision was based would be difficult to imagine, although it must be admitted that only the theory supporting the *Hooven I* decision was a casualty of the *Michelin* case. *Hooven I* itself was not specifically overruled in *Michelin*, probably because the two cases involved somewhat different fact situations and the overruling of *Hooven I* was not immediately required.

The Supreme Court of Ohio, in its decision below, seems to indicate that the *Sunnen* case does not control resolution of the collateral estoppel question in the case at bar because the *Michelin* Court did not specifically overrule *Hooven I*. But it is in just such cases as the instant one, where the earlier court decision involving the same parties has *not* been specifically overruled by the intervening decision of the Supreme Court, that the *Sunnen* decision was meant to be controlling. In *Sunnen* itself, no intervening reversal of the earlier decision, but a "change

in the legal picture," involving a "clarification and growth" of principles, and arising from several intervening U.S. Supreme Court decisions, made the doctrine of collateral estoppel inapplicable. *Commissioner v. Sunnen*, 333 U.S. 591, 602-606. *No intervening reversal of the earlier decision was even mentioned in the Sunnen Court's opinion*, which is significant considering that any such intervening reversal would certainly have controlled the *Sunnen* case. Had there been a specific reversal of the earlier decision when the Court decided the intervening cases, the Court would have had a much easier time disposing of the *Sunnen* case, and would not have been required to articulate at length the "changing legal principles" limitation upon collateral estoppel.

It should also be noted that the reasoning of the court below would require the Supreme Court of the United States, whenever it overruled a leading case like *Low v. Austin*, to specifically overrule each and every other case decision relying upon the leading case, in order to prevent application of collateral estoppel in later cases involving the same parties and issues. This heavy burden the *Sunnen* Court possibly sought to avoid by its development of the "changing legal principles" limitation.

In developing its own very important limitation upon the collateral estoppel doctrine, the *Sunnen* Court was aware that many inequalities and much unnecessary expense could result from improper application of collateral estoppel. The Court warned of certain harmful consequences of collateral estoppel much like those the Petitioner and the amicus IAAO are trying to avoid in the instant case, writing as follows, 333 U.S. at 599:

> "A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the signifi-

> cant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion (citations omitted). Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers."

Keeping in mind that "collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice," 333 U.S. at 599, the *Sunnen* Court reviewed the limitations that had been placed upon collateral estoppel in prior judicial decisions. Citing *Tait v. Western Md. R. Co.*, 289 U.S. 620 (1933), the Court noted that the use of the collateral estoppel doctrine must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. 333 U.S. at 599-600. The *Sunnen* Court also noted that in *Blair v. Commissioner*, 30 U.S. 5 (1937), it was held that an intervening state court decision could "so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." 333 U.S. at 600. Then, the *Sunnen* Court expanded upon the *Blair* ruling by declaring that "the intervening decision

need not necessarily be that of a state court, as it was in the *Blair* case. While such a state court decision may be considered as having changed the facts for federal tax litigation purposes, a modification or growth in legal principles as enunciated in intervening decisions of this Court may also effect a significant change in the situation. Tax inequality can result as readily from neglecting legal modulations by this Court as from disregarding factual changes wrought by state courts. In either event, the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel." 333 U.S. at 600.[1]

The *Sunnen* Court did not ignore the "supervening" decisions facing it, and neither should the Court in the case at bar. Matters involving taxation of imported inventories have not remained "substantially static" since *Hooven I*, and the Court must hold that the *Sunnen* decision precludes application of collateral estoppel in the case

[1] Authorities supporting other limitations upon the doctrine of collateral estoppel, some of which seem to be applicable to the case at bar, are noted in 150 A.L.R. 38, s. 162 A.L.R. 1211, 92 L.2d 940. Among these are cases supporting the notion that collateral estoppel can only be applied properly when the facts that are the basis of the issue in the subsequent proceeding are not only substantially identical, but also, in period of time, are the very same facts that, as the subject of the former litigation, were before the court rendering the former judgment. 150 A.L.R. 38, 43-45. In addition, there are cases supporting the principle that collateral estoppel cannot be properly applied to questions of law, as opposed to questions of fact. 150 A.L.R. 38, 47. In the case a bar, the facts are not the very same facts that faced the Court in *Hooven I*, in that different shipments of substantially identical raw materials are involved; and the question to which collateral estoppel was applied by the Supreme Court of Ohio—whether nondiscriminatory ad valorem taxes on imported raw materials stored in their original packages for future manufacturing use are constitutional—is a question of law, not fact.

at bar to prevent the very same kinds of inequalities in tax administration and litigious confusion that the *Sunnen* Court feared. Therefore, the amicus IAAO respectfully submits that the Court should hold that the Petitioner's levying of an ad valorem personal property tax upon the subject imported raw materials belonging to the Respondent is not barred by the doctrine of collateral estoppel.

2.

THIS COURT SHOULD HOLD THAT THE PETITIONER'S LEVYING OF AN AD VALOREM PERSONAL PROPERTY TAX UPON THE SUBJECT IMPORTED RAW MATERIALS BELONGING TO THE RESPONDENT IS NOT PROHIBITED BY THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION.

Although the Supreme Court of Ohio declined to address constitutional issues raised by the Respondent in its application for review and redetermination because the Ohio court held that the Petitioner was collaterally estopped from collecting the disputed taxes, the Petitioner has raised the question of whether the levying of an ad valorem personal property tax upon the subject raw materials belonging to the Respondent was prohibited by the Import-Export Clause of the United States Constitution (art. 1, §10, cl. 2). The amicus IAAO believes that a non-discriminatory ad valorem tax like Ohio's, applied to imported raw materials stored in their original packages for future use in manufacturing, is not prohibited by the Import-Export Clause, and that this Court should so hold.

As noted above, the *Michelin* Court largely repudiated the original package doctrine, which the Respondent would use to shield its raw materials from taxation.

Michelin Tire Corp. v. Wages, 423 U.S. 276, 296-97. In fact, the *Michelin* Court held that Georgia's imposition of a non-discriminatory ad valorem personal property tax on an inventory of tires in storage was not within the constitutional prohibition against laying "any Imposts or Duties on Imports," *without addressing the question of whether the Georgia Supreme Court was correct in holding that the tires had lost their status as imports.* 423 U.S. 276, 279. The Court was able to reach this conclusion because its own independent study persuaded the Court that a non-discriminatory ad valorem property tax is not the type of state exaction which the framers of the U.S. Constitution had in mind as being an "impost" or "duty." 423 U.S. 276, 283.

The case at bar, like *Hooven I*, does not deal with taxes on "goods" for sale, like tires, but with taxes on raw materials to be used in manufacturing. This fact may explain why the *Michelin* Court did not specifically overrule *Hooven I* when it overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), another decision involving "goods" (wine). Perhaps, the *Michelin* Court wanted to reserve judgment on the question of whether ad valorem taxes on raw materials should be treated in the same way as the taxes on the "goods" in *Michelin* for purposes of Import-Export Clause analysis.

In any event, the same analysis that led the *Michelin* Court to conclude that non-discriminatory ad valorem property taxes on "goods" are not "imposts" or "duties" also leads to the conclusion that imported raw materials may be subjected to non-discriminatory taxation. Nothing in the Constitution itself, or in the authorities cited in the *Michelin* decision, supports a distinction between "goods" and raw materials for purposes of determining the constitutionality of ad valorem property taxes under

the Import-Export Clause of the Constitution. If the Import-Export Clause "cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies," 423 U.S. at 287, the Import-Export Clause likewise accords no preferential treatment to imported raw materials.

It is preferential treatment, however, that the Respondent is seeking in the case at bar. Should the Court rule for the Respondent, holding that the Petitioner's nondiscriminatory ad valorem property tax cannot constitutionally be levied on the Respondent's inventory of raw materials, the Court would be approving an exemption from property taxation that would ultimately discriminate against other raw materials produced in the United States, other imported raw materials no longer in their original packages, other imported raw materials not packaged at all, and inventories other than raw materials, creating assessment inequities at the state and local level, producing mountains of litigation, and at the same time denying much needed revenue to hard-pressed state and local governments.

Added to the enormous amount of property that is already exempt from state and local taxation, the property which the Respondent proposes to exempt, belonging to itself and to other manufacturers, would constitute a burden to state and local governments, and the exemption would likely contribute to the constant raising of taxes on nonexempt property, and the reduction of state and local government services, which have accompanied the sizeable increases we have seen lately in the types of property and the types of property owners that are eligible for ad valorem tax exemptions.

When one property is exempted from taxation, owners of other property tend to bear a greater tax burden as a result. Thus, not only will owners of other inventories not exempted from taxation be at a disadvantage as a result of a ruling for the Respondent in the case at bar, but also, owners of nonexempt property in general will be at a disadvantage. Further promoting of this kind of assessment inequity, which allows some property owners to pay no tax at all, while their neighbors are forced to settle for a reduction in state and local government services, or bear more than their fair share of the ever-increasing cost of government services, should be done only with the very greatest care, and there is no reason for such action in the case at bar.

CONCLUSION

We respectfully conclude that this Court should hold that the Petitioner's levying of an ad valorem personal property tax upon the subject imported raw materials belonging to the Respondent is not barred by the doctrine of collateral estoppel or prohibited by the Import-Export Clause of the United States Constitution (art. 1, §10, cl. 2).

Respectfully submitted,

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